SARAVANAN KS SOMU

v.

TIMBALAN MENTERI DALAM NEGERI MALAYSIA & ORS

HIGH COURT MALAYA, IPOH
BALIA YUSOF WAHI JC
[CRIMINAL APPLICATION NO: 44-5-2004]
10 DECEMBER 2004

CONSTITUTIONAL LAW: *Double jeopardy - Federal Constitution, art. 7(2) - Applicability - Whether applies only if there is an earlier acquittal or conviction of offence charged*

PREVENTIVE DETENTION: *Detention order - Section 4(1) Emergency (Public Order and Prevention of Crime) Ordinance 1969 - Second limb contains further two sub-limbs - Whether Minister's failure to specify which of two sub-limbs applicable affected validity of order*

STATUTORY INTERPRETATION: *Construction of statutes - Section 4(1) Emergency (Public Order and Prevention of Crime) Ordinance 1969 - Second limb of s. 4(1) contains further two sub-limbs - Whether word "or" separating two sub-limbs given a disjunctive interpretation*

This was the applicant's application for a writ of *habeas corpus* after he was detained pursuant to a detention order ('DO') issued by the relevant Minister under the second limb of s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance'). The issues were: (1) whether the fact that the applicant was charged with a similar offence in the sessions court gave rise to double jeopardy thereby violating art. 7(2) of the Federal Constitution ('FC'); and (2) whether the DO was defective as the Minister did not further specify which one of the two sub-limbs in the second limb of s. 4(1) of the Ordinance was applicable. This was due to the word "or" in between the said two sub-limbs.

Held (dismissing the application):

[1] Based on art. 7(2) of the FC, the principle of double jeopardy applied only in a case where a person has earlier been acquitted or convicted of an offence and is charged again for the same offence. In the present case, the appellant had neither been convicted nor acquitted of the offence charged in the sessions court. He was only charged therein and the case was still pending. The allegation of facts in the DO which contained a charge as that of the sessions court was a mere allegation. The applicant was not being tried. This was a detention without a trial. Ordinary criminal proceedings in which charges are preferred and procedures under the Ordinance are two different and separate matters. Accordingly, there was no violation of art. 7(2). (pp 341 h & 342 a-g)

[2] It is established that s. 4(1) of the Ordinance comprised of two separate and distinct limbs. The failure of the Minister to specify which limb is applicable makes the order bad in law and merits intervention by the court. However, the sub-limbs in the second limb of s. 4(1) are not distinct of each other. They refer to "suppression of violence" and "the prevention of crimes involving violence" respectively. The focus and intent of Parliament in the second limb is solely for the curtailment of violence as opposed to preservation of public order in the first limb. As such, the second limb of s. 4(1) has only one purpose and intent namely the curtailment of violence although couched in the fashion of giving rise to two sub-limbs. Further, the detailed allegation of facts supported the Minister's basis for issuing the DO. The Minister applied his mind to those facts before making the DO. His affidavit clearly stated that upon receiving the report of the arrest and detention of the applicant from the designated officer, he was satisfied that a DO under s. 4(1) of the Ordinance ought to be made against the applicant under the second limb of the section. He was satisfied that the grounds on which the DO was made was within the scope of the provision of the Ordinance. The factual basis of the Minister's declared satisfaction precluded s. 7C and s. 7D of the Ordinance from being examined. (pp 343 b, h & 344 a-d)

Case(s) referred to:

A Chandra Segaran Anggapa v. Timbalan Menteri Dalam Negeri Malaysia & Ors [2002] 2 AMR 1917 ***(not foll)***

Chia Khim Seng v. Deputy Minister of Home Affairs [1997] 2 J Cr 279 ***(refd)***

Henry Arumanathan v. Deputy Minister of Home Affairs & Ors [1995] 1 CLJ 683 HC ***(refd)***

Menteri Hal Ehwal Dalam Negeri & Another v. Lee Gee Lan & Another Application [1993] 3 MLJ 673 ***(refd)***

Mok Han Liang v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [1996] 3 CLJ 122 HC ***(refd)***

R v. Miles [1980] 24 QBD 423 ***(refd)***

Yeap Hock Seng v. Minister For Home Affairs, Malaysia & Ors [1975] 2 MLJ 279 ***(refd)***

Legislation referred to:

Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 4(1), 7C, 7D

Federal Constitution, art. 7(2)

Penal Code, ss. 34, 395

For the accused - Saravanan KS Somu; M/s Sundarajan & Assoc
For the prosecution - Najib Zakaria

Reported by Usha Thiagarajah

JUDGMENT

Balia Yusof Wahi JC:

The applicant in the instant case was detained pursuant to a detention order dated 12 August 2003 issued by the Timbalan Menteri Dalam Negeri Malaysia (the Minister) under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the ordinance'). He applied for a writ of *habeas corpus*. The detention order against the applicant reads as follows:

ORDINAN DARURAT
(KETENTERAMAN AWAM DAN MENCEGAH JENAYAH) 1969

PERINTAH TAHANAN
[Seksyen 4(1)]

Kepada:

Pegawai Yang Menjaga Pusat Pemulihan Akhlak, Simpang Rengam, Johor;

Ketua Polis Negara, Malaysia

Semua Pegawai Polis Diraja Malaysia yang berkenaan

BAHAWASANYA saya, berpuashati yang Perintah Tahanan adalah perlu dibuat ke atas orang yang namanya tersebut di bawah ini dengan tujuan:

(a) xxx

(b) Menghapuskan kekerasan*

(c) Mencegah jenayah melibatkan kekerasan*

Nama	No. Kad Pengenalan
SARAVANAN A/L K.S. MONU	670119-08-6669

MAKA, OLEH YANG DEMIKIAN, pada menjalankan kuasa yang diberi di bawah Seksyen 4(1), Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969, saya dengan ini memerintahkan supaya orang yang namanya yang tersebut I atas di tahan selama dua (2) tahun mulai dari 12 haribulan Ogos 2003 di Pusat Pemulihan Akhlak, Simpang Rengam, Johor atau di mana-mana tempat lain sebagaimana yang diarah dari semasa ke semasa.

Diperbuat pada 12 haribulan Ogos 2003

dtt
(DATO ZAINAL ABIDIN BIN ZIN)
TIMBALAN MENTERI DALAM NEGERI
MALAYSIA

[KAMJ – 14938]

* Potong yang tidak berkenaan

Accompanying the said order were the following allegations of facts which sets out the reasons for the issuance of the order;

ORDINAN DARURAT (KETENTERAMAN AWAM DAN MENCEGAH JENAYAH) NO. 5/69

NAMA ORANG TAHANAN : SARAVANAN A/L K S. SOMU

NO. KAD PENGENALAN : 670119-08-6669

ALASAN-ALASAN YANG PERINTAH ITU DIBUAT

Bahawa kamu adalah seorang ahli kumpulan samun India yang melibatkan diri dalam kegiatan jenayah kekerasan.

PENGATAAN-PENGATAAN FAKTA YANG ATASNYA PERINTAH ITU DIASASKAN:

Bahawa kamu adalah seorang ahli kumpulan samun India dalam 'OPS MONEY CHANGER' yang bergiat cergas melakukan samun ke atas mangsa-mangsa peniaga dan pekerja-pekerja kedai Pengurap Wang di sekitar Bandaraya Johor Bahru, Johor. Di antara kegiatan jenayah kekerasan yang melibatkan kamu adalah berikut:

1. Bahawa kamu pada bulan Disember 2001, jam lebih kurang 2.00 pagi, di sebuah kedai mesin kuda di Taman Munsyi Ibrahim, Tampoi, Johor Bahru, Johor, bersama beberapa orang rakan sejenayah dengan bersenjatakan pisau telah melakukan samun ke atas beberapa orang mangsa di dalam kedai tersebut. Kumpulan kamu telah merampas sejumlah wang tunai lebih kurang RM5,000.00 daripada mangsa-mangsa tersebut.

2. Bahawa kamu pada penghujung bulan Disember 2001, jam lebih kurang 5.30 petang, di kawasan jejantas berhampiran Merlin Tower, di Simpang Jalan Tun Abd. Razak, Johor Bahru, Johor, bersama beberapa orang rakan sejenayah dengan bersenjatakan pisau telah melakukan samun ke atas dua (2) orang mangsa lelaki India Muslim yang sedang berhenti di Simpang jalanraya tersebut. Kumpulan kamu telah merampas beg mengandungi wang tunai berjumlah lebih kurang RM140,000.00 daripada mangsa tersebut.

3. Bahawa kamu pada 08.02.2003, jam lebih kurang 3.15 petang, bertempat di Pam Minyak Caltex, Jalan Tun Abd. Razak, Johor Bahru, Johor, bersama beberapa orang rakan sejenayah dengan bersenjatakan sepucuk pistol telah melakukan samun ke atas seorang mangsa lelaki Cina yang sedang mengisi minyak keretanya. Kumpulan kamu telah merampas beg mengandungi wang tunai berjumlah lebih kurang Dollar Singapura $151,427.00 daripada mangsa tersebut.

SALINAN DIAKUI SAH
d.t.t.
Mohd. Zabir Abdul Majid C/Insp
JSJ D7
Bukit Aman

Several grounds were stated by the applicant in his affidavit in support of this application but only two grounds were relied upon and advanced by counsel namely on the issue of double jeopardy and wrong limb of s. 4(1) of the Ordinance.

On the issue of double jeopardy, the applicant contends that allegation of fact No. 5 of the "Penyataan-Penyataan Fakta Yang Atasnya Perintah Itu Diasaskan" contains a charge which had already been preferred against him at the Johor Bharu Sessions Court. Allegation No. 5 sets out the following:

> 5. Bahawa kamu pada 16.9.2002 jam lebih kurang 12.00 tengah hari, di kawasan lampu isyarat di hadapan stesyen keretapi, Jalan Tun Abd. Razak, Johor Bharu, Johor bersama beberapa orang rakan sejenayah dengan bersenjatakan pisau telah melakukan samun ke atas seorang (1) mangsa lelaki India yang sedang berhentikan motosikalnya di simpang jalan raya tersebut. Kumpulan kamu telah memotong beg yang mengandungi wang tunai lebih kurang RM80,000.00 daripada mangsa tersebut.

In Kes Tangkapan No. 62-199-2002 at the Johor Bharu Sessions Court, the applicant was charged under s. 395 of the Penal Code read with s. 34 of the same. The charge against him reads:

> Bahawa kamu bersama-sama dengan 4 orang lagi yang masih bebas pada 16.9.2002 jam lebih kurang 1200 hrs berdekatan dengan Merlin Tower di hadapan stesyen keretapi Johor Bharu di dalam Negeri Johor, didapati telah melakukan samun berkawan ke atas seorang lelaki India nama S. Thangathurai a/l Selvaretnam KP: 810211-02-5617 dan telah mengambil wang tunainya sebanyak RM80,000.00. Oleh itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah sek. 395 Kanun Keseksaan dan dibaca bersama di bawah sek. 34 undang-undang yang sama.

In his submissions before me, learned counsel for the applicant contends that the above two charges against the applicant are the same and relates to the same offence and thus offending art. 7(2) of the Federal Constitution on the doctrine of double jeopardy. Such being the case, counsel submits that the court is permitted to interfere and declare the detention unlawful.

For ease of reference, perhaps I should reproduce art. 7(2) of the Federal Constitution which reads as follows:

> 7(2) A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted.

Article 7(2) of the Federal Constitution lays down the principle that a person shall not be placed in "double jeopardy" and be punished twice for the same offence. It is a principle of the common law of England and in particular in the administration of criminal justice that: "Where a person has been convicted of an offence by a court of competent jurisdiction the conviction is a bar to all further criminal proceedings for the same offence" (per Charles J in *R v.*

Miles [1980] 24 QBD 423). This principle is also based on the Latin maxim Nemo debet bis vexari – a man must not be put twice in peril for the same offence. Looking squarely at the provisions of art. 7(2), the principle of double jeopardy could only apply in a case where a person has earlier been acquitted or convicted and is charged again for the same offence. In the case of the applicant, he has neither been convicted nor acquitted of the offence for which he is charged at the Johor Bharu Sessions Court. He has only been charged on 8 November 2002 and the case is still pending. As to the allegation of fact No. 5 in the detention order, it is merely an allegation of facts on which the detention order against him is made. He is not being charged. The applicant is not being tried and there can never be any trial on that allegation of facts. Perhaps the applicant should be reminded that this is a detention without trial. Ordinary criminal proceedings in which charges are preferred and procedures under the Ordinance are two different and separate matters. As stated by the great judge Abdoolcader J (as he then was) in the case of *Yeap Hock Seng v. Minister For Home Affairs, Malaysia & Ors* [1975] 2 MLJ 279:

> In any event the acquittal of and accused person does not necessarily mean that he cannot be acting in a manner prejudicial to the purposes set out in Section 4(1) of the Ordinance. The ordinary criminal laws of the country and the Ordinance are not substitutes for each other but are complementary. The constitutional protection against double jeopardy embodied in Article 7(2) of the Constitution and the principle of *autrefois acquit* and *convict* enacted in Section 302 of the Criminal Procedure Code cannot be applicable as satisfaction under the Ordinance is not a prosecution or trial. Indeed the very essence of preventive detention is incarceration without the benefit of a prosecution or trial and with no offence proved nor any charge formulated or preferred. There is and can be no identity of offence or a prosecution between detention under the Ordinance and a conviction upon trial by court of law. An order of detention under the Ordinance is not therefore illegal merely because it nullifies a previous order of discharge of acquittal by a court in criminal case. (*Raman Lal Rathi v. Commissioner of Police, Calcutta* AIR [1952] Cal 26; *Dharamadas Shyamlal v. District Magistrate, Ahmedabad* AIR [1960] 43.

In the circumstances, I find no merit in the applicant's argument that these is a violation of art. 7(2) of the Federal constitution and his objection to the detention order on this ground must fail.

The second ground of objection advanced by the applicant against the order is on the ever popular premise that the Minister in issuing the order has acted arbitrarily and mechanically. It is the contention of the applicant that while it is established that s. 4(1) of the Ordinance contains two limbs, the second limb of the section also contains two sub-limbs which is entirely different from one another. Every detention order issued by the Minister under the second

limb of s. 4(1) of the Ordinance must in the applicant's contention refer to only any one of the two sub-limbs. Since the detention order made against the applicant contains both the sub-limbs, the order is therefore defective and bad in law. It shows the casual and cavalier manner of the Minister in issuing the same and an indication that he was acting mechanically in doing so.

It is established that s. 4(1) of the Ordinance comprises of two separate and distinct limbs as held by the Supreme Court in the case of *Menteri Hal-Ehwal Dalam Negeri & Another v. Lee Gee Lan and Another Application* [1993] 3 MLJ 673. The failure of the Minister to specify in the order which limb is applicable makes the order bad in law and merits intervention by the court. It is incumbent upon the Minister to invoke the correct limb in issuing the order under the section. (*Chia Khim Seng v. Deputy Minister of Home Affairs* [1997] 2 J Cr. 279, *Mok Han Liang v. Timbalan Menteri Dalam Negeri, Malaysia & 2 Ors.* [1996] 3 CLJ 122).

Lee Gee Lan's case is an authority from the highest court of our country. I am bound by its decision that there are two limbs to s. 4(1) of the Ordinance. The two limbs are distinct and different from one another in its purpose as pronounced under the section. In so far as the second limb is concerned, it is meant for the suppression of violence or the prevention of crimes involving violence. What is sought to be curtailed by that limb is violence, be it pre existing violence or intended future violence. In my view, the curtailment of violence may be achieved by either the suppression of pre existing violence or the prevention of intended future acts of crimes involving violence. This is consonant with the very purpose and intent of the whole section which is preventive in nature. I am aware of the decision of my learned brother Syed Ahmad Helmy JC in the case of *A Chandra Segaran a/l Anggapa v. Timbalan Menteri Dalam Negeri Malaysia & Ors* [2002] 2 AMR 1917. Relying on the said authority the learned counsel for the applicant submits that the failure of the Minister to indicate which of the two sub limbs is applicable renders the order defective. In his judgment, the learned Judicial Commissioner held that:

> based on the disjunctive interpretation of the word "or" appearing in section 4(1) of the Ordinance I am of the considered view that the second limb therefore can be sub divided further into two and separate sub-limbs, namely the "suppression of violence" and the "prevention of crimes involving violence".

While I agree that there are two sub-limbs in the second limb of the s. 4(1), I am of the view that the two sub-limbs are not distinct as in the case of the first and second limbs. The focus and intent of Parliament in the second limb of that section is solely the curtailment of violence as opposed to preservation of public order in the first limb. Seen in that light, thus it is my view that

the second limb of s. 4(1) of the Ordinance has only one purpose and intent namely the curtailment of violence although it is couched in the fashion of giving rise to two sub-limbs. Of course, in considering the propriety of the order as to which limb of s. 4(1) is applicable, one cannot divorce oneself from considering the detailed allegations of facts which supports the basis of the issuing of the order. My close examination of allegation of facts appended to the order fortify my view that the Minister applied his mind to those facts before making the order. I am satisfied that the detention of the applicant is within the scope of the law. The affidavit of the Minister, in particular at paras 6 and 8 of encl. 13 clearly state that upon receiving the report of the arrest and detention of the applicant from the designated officer, he was satisfied that a detention order under s. 4(1) of the Ordinance ought to be made against the applicant under the second limb of the said section. He was satisfied that the grounds on which the detention order was made is within the scope of the provisions of the Ordinance. The factual basis of the Minister's declared satisfaction in the detention order is precluded by s. 7C and 7D of the Ordinance from being examined. (*Henry a/l Arumanathan v. Deputy Minister of Home Affairs & 2 Ors* [1995] 1 CLJ 683).

For the reasons aforesaid. I find no merit in the applicant's objection to the detention order dated 12 August 2003 and the application for a writ of *habeas corpus* in encl. 3 is hereby dismissed.